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Supreme Court, U.S.
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No. 84-6470

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT DAVIDSON,

Petitioner

v.

JOSEPH CANNON and
ROBERT JAMES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents,
Joseph Cannon and Robert James
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-7089

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

MADELEINE WATERS MANSIER*
Deputy Attorney General
On the Brief

*Counsel of Record

QUESTIONS PRESENTED

1. When there is no serious conflict over whether a merely negligent failure to protect a prisoner from a single, isolated attack by another person constitutes a deprivation of a substantive due process liberty interest, should not this Court decline review?

2. When the decision by the court below that the mere negligence of the prison officials lacked the outrageousness or official abuse of power needed to rise to the level of a deprivation of a constitutional right, which decision is fundamentally consistent with the procedural due process analysis in Parratt v. Taylor and is expressly consistent with prior decisions by this Court, should not this Court decline review?

3. Because the absence of a deprivation of a substantive right negates any inquiry into what process is due, thereby rendering Parratt v. Taylor inapplicable, should not this Court decline review?

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COUNTERSTATEMENT OF THE CASE

Petitioner, seeking a writ of certiorari in this Court, claims that the Court of Appeals for the Third Circuit acted improperly when it reversed the decision of the District Court and dismissed his complaint. In fact, the decision of the Third Circuit was perfectly proper and in accord with prior decisions of the Supreme Court. This case presents no legal issues which warrant consideration by this Court.

Petitioner, an inmate in the New Jersey State Prison, filed a complaint in the United States District Court for the District of New Jersey on January 27, 1981, alleging that respondents, prison officials had violated the Eighth and Fourteenth Amendments of the Constitution by failing to protect him from assault by another inmate. Petitioner had been threatened by an inmate named McMillian following a disciplinary hearing involving the two men. Petitioner wrote a note about the threat which, according to his own testimony at trial, was not for the purpose of his own safety, but for the purpose of going on record as not being responsible for whatever further trouble might develop between McMillian and him. The note eventually reached respondent Cannon, Assistant Superintendent, who forwarded it to respondent James, Internal Affairs. Thereafter, McMillian did attack petitioner, causing injury.

The matter was tried before the Honorable Stanley S. Brotman, U.S.D.J. The district court found that respondents negligently failed to protect Davidson, which negligence was a proximate cause of petitioner's injuries. The district court concluded that petitioner had not established a claim of cruel and unusual punishment in violation of the Eighth Amendment because they "did not act with deliberate or callous indifference to [petitioner's] needs and because the incident complained of was a single attack" (5A-6A). However, the district court found that petitioner had a "liberty

interest in remaining free from physical assault" (8A), that respondents were negligent, that their negligence deprived petitioner of his liberty interest, and that the deprivation was without due process of law because the New Jersey Tort Claims Act provides that a public employee is not liable for an injury caused by one prisoner to another.

Respondents appealed to the United States Court of Appeals for the Third Circuit. Following oral argument before a panel of that court, the Third Circuit, on its own motion, ordered reargument before the court en banc. The court en banc reversed, holding that respondents were negligent and that petitioner had a substantive Fourteenth Amendment liberty interest in the form of a right to personal security, but the conduct of respondents did not rise to the level of depriving petitioner of his substantive liberty interest. "When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional right within the scope of §1983" (24A). Since there was no deprivation of a protected interest, and since there was no claim of a statutory or other entitlement, there was "nothing to trigger an inquiry into what process [was] due" (25A).

REASONS FOR DENYING THE WRIT

1. There is No Serious Conflict of Authority Which Requires an Authoritative Decision of This Court.

Petitioner argues that this Court determined in Parratt v. Taylor, 451 U.S. 527 (1981), that a loss of property as a result of state action was actionable under 42 U.S.C. §1983 even if the state action was only negligent. Petitioner argues further that in the wake of Parratt the courts of appeals have split on the issue

of whether a loss of liberty as a result of state action which is merely negligent is actionable under §1983.

Assuming arguendo that petitioner even had a liberty interest here,[1] his reasoning is flawed. This Court did not "hold" in Parratt that a negligent loss of property was actionable because this Court's focus in that case was on procedural, not substantive, due process. More precisely, this Court determined that regardless of whether his loss of property as a result of negligent state action was actionable or not, a question of substantive due process, Taylor's loss was not without procedural due process; so his complaint failed to state a §1983 cause of action.

Furthermore, there is no serious conflict among the courts of appeals on the issue of whether a prisoner who claims a loss of liberty as a result of a merely negligent failure by state officials to protect him from assault by another inmate states a cause of action. The decision of the Third Circuit that it does not is not in conflict with the decision of any other circuit and is expressly in agreement with the Fourth, Seventh and Eighth Circuits.

In an attempt to demonstrate a conflict, among the courts of appeals petitioner first cites Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), rehearing en banc granted (August 29, 1983) as an example of the Fourth Circuit's determination that a prison inmate's loss of liberty as a result of negligent state action constitutes an actionable deprivation that may give rise to a procedural due process claim under §1983. Petitioner has failed to note that the Fourth Circuit, on rehearing en banc, held that "Daniel's bodily injury occasioned by simple negligence was not a liberty

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[1] A determination by this Court that petitioner had no liberty interest here would constitute a perfectly proper basis for affirming the decision of the Third Circuit.

interest protected by the due process clause." Daniels v. Williams, 748 F.2d 229, 230 (4th Cir. 1984). In reaching that decision, which is in complete agreement with the Third Circuit's decision, the Court relied on this Court's opinion in Parratt, quoting Baker v. McCollan, 443 U.S. 137 (1979), wherein the elusiveness of the present issue was acknowledged, and thus the Fourth Circuit concluded, "We do not believe the Court intended Parratt to be applied automatically in a per se manner in every instance in which an act of negligence can also be stated as a §1983 claim." Daniels v. Williams, 748 F.2d 229, 231 (4th Cir. 1984).

Petitioner's reliance on decisions in the Fifth and Ninth Circuits to demonstrate a conflict requiring resolution by this Court is equally unavailing. Although the Fifth Circuit in Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984), determined that the complaint, which alleged a negligent failure to protect, stated a cause of action, the plaintiff was a pretrial detainee, not a convicted prisoner, and therefore entitled to a fuller panoply of rights. The Ninth Circuit in Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983), rehearing en banc granted, 729 F.2d 613 (March 28, 1984), also impliedly recognized a cause of action for a negligent deprivation of liberty, but that was based on the court's definition of liberty as "wrongful incarceration," id. at 1480, not a negligent failure to protect, such as alleged by petitioner here.

Petitioner himself articulates doubt about whether the Seventh Circuit's decisions demonstrate a conflict with the Third Circuit's decision here. In fact, as a close reading of petitioner's own brief reveals, there is no conflict between those two courts of appeals. They agree that an isolated instance of negligent failure to supervise or protect a prisoner "does not rise to the level of a constitutional deprivation." State Bank v. Camic, 712 F.2d 1140, 1143 (7th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 491 (1983). As petitioner acknowledges, this view is

shared by the Eighth Circuit, Mills v. Smith, 656 F.2d 337 (8th Cir. 1981).

In the absence of any serious conflict among the courts of appeals, this Court should deny the writ.

2. The Decision by The Court Below Is Fundamentally Consistent With The Decision of This Court in Parratt v. Taylor and Is Expressly Consistent with Earlier Supreme Court Rulings; So No Review by This Court Is Needed.

Petitioner claims that the decision of the Third Circuit is fundamentally inconsistent with this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), thereby requiring review by this Court. Petitioner is mistaken. The decision below is quite consistent with Parratt, and indeed with many other Supreme Court decisions. No review is needed.

Petitioner does not question the Third Circuit's determination, and indeed that of the District Court, that "nothing in the Court's cases [prior to Parratt] provides any support for the principle that negligent conduct by a state official causing injury to the person constitutes a deprivation of a Fourteenth Amendment right which can be redressed in a §1983 suit (20A). Although the Supreme Court had granted certiorari twice to resolve that very issue, it did not because it disposed of both cases on other grounds. In Procunier v. Navarette, 434 U.S. 555 (1978), this Court decided the case on the basis of the defense of qualified immunity. The next year this Court decided Baker v. McCollan, 443 U.S. 137 (1979) by finding that no constitutional right was implicated in the first instance.

Then in 1981 the Supreme Court decided Parratt. Although this Court suggested that it would attempt once again to resolve the issue of whether mere negligence will support a claim for relief under §1983, once again this Court decided the case before

it on other grounds. In Parratt this Court recognized at the outset that it did not matter whether Taylor had been "deprived" of his property by the negligence of the prison officials because, regardless of whether negligence amounted to a deprivation within the meaning of §1983 or not, the complaint failed to state a cause of action because of the availability of a state remedy. In short, even if there were a deprivation of his substantive right (an issue not analyzed or decided), such an alleged deprivation was not without procedural due process. The analysis by this Court was purely one of procedural, not substantive, due process. Since an acceptable procedure was available, thereby precluding a cause of action, this Court did not reach, because it did not need to reach, the issue of whether the alleged negligent state action constituted a deprivation within §1983 at all.

Consequently petitioner mischaracterizes the Parratt decision when he says, "this Court proceeded to hold that negligent state action resulting in the loss of a prison inmate's hobby kit 'unquestionably' amounted to a deprivation within the meaning of the Fourteenth Amendment." (Petitioner's brief at 10; emphasis supplied). That was not a "holding." That was merely a statement of this Court's assumption arguendo that enabled the Court to reach the procedural due process issue on which that case could so easily and so properly be disposed of.

Equally important, the decision by the court below is expressly consistent with prior decisions of this Court when this Court did undertake a substantive due process analysis of a liberty interest. One such case is cited with approval by this Court in Parratt and by both the Third Circuit and the district court below. In Ingraham v. Wright, 430 U.S. 651 (1977) this Court decided that to establish a deprivation of a substantive due process interest in liberty, the official conduct must exceed "a de minimis level of imposition with which the Constitution is not concerned." Id. at

674. There must be an abuse of government power. Id. at 731. Accord, Monroe v. Pape, 365 U.S. 1967, 172 (1961); Meyer v. State of Nebraska, 262 U.S. 390 (1923). The official conduct must "shock the conscience." Rochin v. California, 342 U.S. 165, 172 (1952).

In light of the requirements established by this Court for stating a cognizable claim of a violation of a liberty interest, it is clear that the Third Circuit correctly held

> When the only finding is that of mere negligence, as here, we cannot find the 'outrageousness' or abuse of official power that warrants raising the tortious conduct of the prison official to the level of a deprivation of constitutional right within the scope of §1983 [24A].

In conclusion, since the decision of the Third Circuit in analyzing an issue of substantive due process is not fundamentally inconsistent with this Court's determination of a procedural due process issue in Parratt, and since the Third Circuit's analysis is extremely consistent with this Court's earlier rulings concerning a substantive due process liberty interest, this Court should deny the writ.

3. The Third Circuit Properly Determined That in the Absence of a Deprivation of a Substantive Right No Process Is Due; So the Procedural Due Process Analysis in Parratt v. Taylor Is Not Applicable and No Review by This Court is Needed.

Petitioner argues that this Court should grant his writ simply because he has sued prison officials for injuries sustained when he was attacked by another prisoner and the New Jersey Tort Claims Act provides that "[n]either a public entity nor a public employee is liable for ... any injury caused by ... a prisoner to any other prisoner. N.J.S.A. 59:5-2(b)(4). Petitioner apparently thinks that the existence of the immunity automatically provides him with a civil rights cause of action in federal court. That

claim was expressly rejected in Martinez v. California, 444 U.S. 277, 281-283 (1980).

The obvious flaw in petitioner's reasoning is that 42 U.S.C. §1983 expressly requires a "deprivation" of rights. The Fourteenth Amendment prohibits the deprivation of liberty, inter alia, without due process of law. Only deprivations require due process. Where there is no deprivation (see the opinion of the court below and Point 2, supra), one never reaches the issue of whether what was done was done with or without due process.

Moreover, although petitioner claims that he does not ask this Court "to wrestle with the difficult question of [Parratt's] general relation to the various doctrines of sovereign immunity" (Petitioner's brief at 16), that is precisely what might be required if this Court were to grant the writ on the basis of petitioner's third argument.

Since there is no procedural due process analysis required in the absence of a deprivation of a substantive right, as here, Parratt's analysis of state remedies is not implicated; so this Court should deny the writ.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents,
Joseph Cannon and Robert James

By: Madeleine Waters Manzier
Madeleine Waters Manzier
Deputy Attorney General

JAMES J. CIANCIA
Assistant Attorney General
Of Counsel

Dated: April 29, 1985